No. 01-836

JAN 29 2002

In the Supreme Court of the United States

BARRY V. O'CONNOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

JOHN F. DE PUE
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the prohibition of any visual depiction that "appears to be[] of a minor engaging in sexually explicit conduct" in the Child Pornography Prevention Act of 1996, 18 U.S.C. 2252A, 2256(8)(B) (Supp. V 1999), violates the First Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Discussion	5
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Free Speech Coalition v. *Reno*, 198 F.3d 1083 (9th Cir. 1999) 5, 6

United States v. *Hilton*, 167 F.3d 61 (1st Cir.), cert. denied, 528 U.S. 844 (1999) 5

United States v. *James*, 55 M.J. 297 (C.A.A.F. 2001) 5

Constitution and statutes:

U.S. Const. Amend. I 5

Child Pornography Prevention Act of 1996, 18 U.S.C. 2251 *et seq.*:

18 U.S.C. 2252A (Supp. V 1999) 2, 5

18 U.S.C. 2256(8) (Supp. V 1999) 2-3

Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:

Art. 125, 10 U.S.C. 925 2

Art. 134, 10 U.S.C. 934 ..... 2, 5

Miscellaneous:

Manual for Courts-Marital United States (2000 ed.) 2

In the Supreme Court of the United States

No. 01-836

BARRY V. O'CONNOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the Court of Appeals for the Armed Forces (Pet. App. 2a) is reported at 56 M.J. 141. The opinion of the Air Force Court of Criminal Appeals (Pet. App. 11a-15a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on September 6, 2001. The petition for a writ of certiorari was filed on December 3, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following trial by a general court-martial, Pet. 2; Pet. App. 12a, and, in accordance with pleas of guilty,

petitioner was convicted of two specifications of forcible sodomy on a child under the age of 16, in violation of 10 U.S.C. 925 (Art. 125, Uniform Code of Military Justice (UCMJ)), four specifications of indecent acts on a female under 16 years of age in violation of 10 U.S.C. 934 (Art. 134, UCMJ); one specification of obstruction of justice, in violation of 10 U.S.C. 934 (Art. 134, UCMJ); and one specification of receipt of child pornography and one specification of possession of child pornography, in violation of 18 U.S.C. 2252A (Supp. V 1999), as assimilated by 10 U.S.C. 934 (Art. 134, UCMJ). Court-Martial Order of Apr. 20, 1999; Pet. App. 12a. As approved by the convening authority, his sentence included a dishonorable discharge, confinement for 12 years, and reduction to the lowest enlisted grade. *Ibid.* Both the United States Air Force Court of Criminal Appeals and the United States Court of Appeals for the Armed Forces affirmed. *Id.* at 11a-15a; *id.* at 2a.

1. The definition of the phrase "child pornography" as used in 18 U.S.C. 2252A (Supp. V 1999) and assimilated by 10 U.S.C. 934 (Article 134, UCMJ)* is contained in 18 U.S.C. 2256(8) (Supp. V 1999). That Section provides:

> "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

---

* Section 934 prohibits, inter alia, the commission of "crimes and offenses not capital." Such offenses consist of "noncapital crimes and offenses prohibited by the United States Code." See *Manual for Courts-Martial United States* para. 60c(4)(b) (2000 ed.).

> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

18 U.S.C. 2256(8) (Supp. V 1999). During the guilty plea hearing, the military judge defined the phrase "child pornography," in accordance with the definition contained in Section 2256(8). In particular, he explained that it

> means any visual depiction, including any photograph, film, video, picture, or computer or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where, (a) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (b) such visual depiction is or appears to be of a minor engaging in sexually explicit conduct; (c) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or, (d) such visual depiction [i]s advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that [the] material is or contains a visual

depiction of a minor engaging in sexually explicit conduct.

Tr. 57. At the conclusion of the military judge's explanation, petitioner stated that he understood the definition of "child pornography." Tr. 58. He then acknowledged that, on several occasions, he had shown computer images of child pornography to a female minor. Tr. 58-59. He explained that the subjects, who appeared to be minors, were engaged in "[v]arious sexual displays or actions." Tr. 59. On the basis of these admissions, the military judge accepted petitioner's pleas of guilty. Tr. 117.

2. On appeal to the United States Air Force Court of Criminal Appeals, petitioner claimed that the military judge should have recused himself from further participation in the court-martial because the victim's grandfather had approached the judge in a restaurant during an evening recess. Pet. App. 12a. The judge immediately told the victim's grandfather that they should not converse, and the victim's grandfather returned to his table in the restaurant. *Ibid.* Petitioner also claimed that his trial defense counsel's representation was inadequate. *Id.* at 13a. That court rejected both claims and affirmed the findings and the sentence. *Id.* at 13a, 15a.

3. The United States Court of Appeals for the Armed Forces granted review of a question raised for the first time in that court: whether petitioner's convictions on the child pornography counts should be set aside because the definition of child pornography, as explained to petitioner, was unconstitutionally vague and overbroad in that it included depictions of sexually explicit conduct by persons who appear to be minors and depictions presented in a manner that conveys the

impression that the depictions are of minors engaged in sexually explicit conduct. Pet. App. 1a; Appellant C.A. Supp. Pet. 12-13.

4. In *United States* v. *James*, 55 M.J. 297, 298 (C.A.A.F. 2001), the court of appeals held that the inclusion in the definition of child pornography of a depiction that "appears to be" and "conveys the impression" of a minor engaging in sexually explicit conduct does not violate the First Amendment. Relying on *United States* v. *Hilton*, 167 F.3d 61 (1st Cir.), cert. denied, 528 U.S. 844 (1999), the court reasoned that, although the definition constitutes a content-based restriction on the exercise of First Amendment rights, Congress has a compelling interest in regulating child pornography and that the definition of "child pornography," including "virtual child pornography," is narrowly tailored to fit that interest. Pet. App. 8a. In so holding, it expressly rejected the contrary decision of the Ninth Circuit in *Free Speech Coalition* v. *Reno*, 198 F.3d 1083 (1999). Pet. App. 7a. Relying on its decision in *James*, the court below affirmed petitioner's conviction. *Id.* at 2a.

DISCUSSION

Relying on *Free Speech Coalition* v. *Reno*, 198 F.3d 1083 (9th Cir. 1999), petitioner contends (Pet. 4-5) that, insofar as the definition of child pornography governing Section 2252A includes depictions of fictitious children engaged in explicit sexual behavior, it is unconstitutionally overbroad and that his convictions under that statute (as assimilated by 10 U.S.C. 934) should therefore be set aside. Petitioner frames his claim as a challenge to the voluntariness of his guilty plea. As petitioner observes (Pet. 3), while this case was on appeal, the Court granted the government's petition for

a writ of certiorari in *Free Speech Coalition*, *supra*, now styled *Ashcroft* v. *Free Speech Coalition*, No. 00-795 (argued Oct. 30, 2001). That case presents the same conflict for resolution as is presented in this petition. Accordingly, the petition in this case should be held pending the Court's decision in *Free Speech Coalition*.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision of the Court in *Ashcroft* v. *Free Speech Coalition*, No. 00-795 (argued Oct. 30, 2001), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

JOHN F. DE PUE
Attorney

JANUARY 2002